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No. 88-921

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM F. NETSKY, AS EXECUTOR OF THE ESTATE OF FRANK W. NETSKY, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals lacked jurisdiction over the government's appeal on the ground that appeal lay exclusively to this Court under 28 U.S.C. 1252.

1. The underlying substantive issue in this case is the same as that decided by this Court in *United States* v. *Wells Fargo Bank*, No. 86-1521 (Mar. 23, 1988), namely, whether certain "Project Notes" issued by local housing authorities were exempt from the federal estate tax under the United States Housing Act of 1937, ch. 896, 50 Stat. 888. The pertinent facts are as follows: Frank W. Netsky died on August 18, 1981, owning Project Notes in the aggregate face amount of $2,900,000. On May 18, 1982, petitioner filed a federal estate tax return for the decedent's estate, and that return included in the gross estate the Project Notes and interest accrued thereon to

the date of death. Petitioner paid the tax of $1,378,548 shown as due on the return. Pet. App. A19-A21.

In 1984, however, a federal district court held that such Project Notes were exempt from the federal estate tax. *Haffner* v. *United States*, 585 F. Supp. 354 (N.D. Ill.), aff'd, 757 F.2d 920 (7th Cir. 1985). Shortly thereafter, petitioner, invoking the *Haffner* decision, filed a claim for refund of a large part of the federal estate taxes previously paid, asserting that the Project Notes should not have been included in the decedent's gross estate. When the Internal Revenue Service did not act favorably upon the claim within six months, petitioner instituted this suit for refund in the United States District Court for the Eastern District of Pennsylvania.

In the interim, on July 18, 1984, the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 494, was signed into law. Section 641 of that Act responded to the *Haffner* decision. Subsection (a) provided that nothing in any provision of law exempting any property from taxation should exempt the transfer of such property from federal estate, gift, and generation-skipping taxes. Subsection (b)(1) made the provisions of subsection (a) applicable to the estates of decedents dying, gifts made, and transfers made on or after June 19, 1984. Subsection (b)(2) provided that the provisions of subsection (a) should also apply in the case of any transfer of property "if at any time there was filed an estate or gift tax return showing such transfers as subject to Federal estate or gift tax." See *United States* v. *Wells Fargo Bank*, slip op. 2.

2. The district court considered the case on the basis of cross-motions for summary judgment. The government put forth two defenses to the refund suit. First, it argued that *Haffner* was wrongly decided and that Project Notes had never been exempt from the federal estate tax. Second, it argued that, in any event, Section 641(a) and (b)(2)

of DEFRA applied because petitioner had reported the Project Notes as taxable on the estate tax return, and therefore petitioner could not invoke the Housing Act of 1937 to claim that the Project Notes were exempt from the estate tax. In response, petitioner argued that *Haffner* was correctly decided, and that DEFRA did not prevent the court from following *Haffner*. The latter argument had two separate components. First, petitioner argued that Section 641 should not be construed to apply retroactively, at least not to refund claims filed before its enactment (C.A. App. 69-77). Specifically, petitioner argued that the statutory language did not clearly extend Section 641(a) to claims filed before its effective date. Petitioner further argued that "interpretations which avoid constitutional difficulties are preferred," and stated that his suggested construction that DEFRA does not apply in this case "avoids constitutional infirmities which otherwise would require the invalidation of the statute" (C.A. App. 77). Second, petitioner argued that, if the court "were to construe Section 641 to be of retroactive effect before June 19, 1984," then "[s]uch retroactive application * * * would violate the due process and equal protection clauses of the Fifth Amendment" (*ibid.*; see *id.* at 77-84).

The district court accepted petitioner's arguments (Pet. App. A19-A34). The court approved and adopted the *Haffner* decision (Pet. App. A24), and it then turned to a consideration of Section 641 of DEFRA. The court clearly stated that it agreed with petitioner that, as a matter of statutory construction, DEFRA did not apply to the refund claim in this case (Pet. App. A24-A27). The court stated (*id.* at A27): "I do not accept the [government's] argument that the act should apply to refund claims filed before June 19, 1984. Neither the language of the statute nor its legislative history necessarily compel the conclusion

that Congress intended the act to be applied in a fully retroactive fashion." The court then added (*ibid.*): "Moreover, even if that were Congress' intent, I find that retroactive application of the statute would be inappropriate in the circumstances of the instant case because it would violate the plaintiff's constitutional guarantees of due process." The court then proceeded to explain in detail (*id.* at A27-A32) why it believed that retroactive application of Section 641 "would violate the due process clause" (Pet. App. A32, A33).

3. The government appealed to the court of appeals under 28 U.S.C. 1291. Petitioner filed a motion to dismiss the appeal for lack of jurisdiction, asserting that the District Court had held a federal statute to be unconstitutional and therefore 28 U.S.C. 1252 and 1291 permitted an appeal only to this Court. After this Court entered its decision in *Wells Fargo Bank*, the court of appeals denied the motion to dismiss and reversed the judgment below (Pet. App. A1-A14). The court of appeals held that the district court's "language rejecting the retroactive application of [Section 641] on the basis of its language and legislative history amply supports the government's position that the district court based its holding on statutory grounds" (Pet. App. A9-A10). With respect to the district court's additional discussion supporting its conclusion that retroactive application "would be" unconstitutional, the court of appeals stated that "[t]he district court here used the subjunctive mood, indicating that the district Court's opinion was carefully structured to avoid holding that section 641 was unconstitutional" (*id.* at A11-A12). On the merits, the court stated that this Court's decision in *Wells Fargo Bank* required reversal of the judgment of the district court (Pet. App. A13-A14).

4. Petitioner, having successfully argued to the district court that Section 641 of DEFRA should be construed not

to apply retroactively to the refund claim in this case, now argues that the district court's decision was one holding a federal statute unconstitutional, and therefore that the court of appeals lacked jurisdiction to entertain an appeal from its judgment. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Moreover, the question presented is of no continuing significance because the statute providing for direct appeal to this Court when a federal statute has been held unconstitutional, 28 U.S.C. 1252, was repealed by Pub. L. No. 100-352, 102 Stat. 662, effective with respect to judgments entered on or after September 25, 1988. Accordingly, review by this Court is not warranted.

The district court in this case plainly held, as petitioner argued that it should, that Section 641 should not be construed retroactively to apply to the refund claim in this case. The court supported that conclusion by reference to the statute's language and legislative history. The court also stated that retroactive application of the statute would be unconstitutional, which supported its statutory construction because of the principle that statutes should be construed, if possible, to avoid constitutional problems—a statutory construction argument that petitioner pressed upon the district court (see C.A. App. 77). As the court of appeals held, direct appeal to this Court under Section 1252 cannot be invoked where, as here, "the district court merely uses the possible unconstitutionality of a contrary statutory interpretation as the basis for its narrow construction of the statute" (Pet. App. A11).

The correctness of the court of appeals' conclusion is clearly demonstrated by this Court's decision in *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561 (1972), where the district court overturned the

IRS's decision to revoke the Ministry's status as a tax-exempt religious organization because of its political activities. The district court found that all of the organization's activities were in furtherance of its religious beliefs, and it narrowly construed 26 U.S.C. 501(c)(3) as not proscribing those activities. The district court found that this construction of the statute was necessary to preserve its constitutionality, discussing in some detail the reasons why, in its view, interpreting Section 501(c)(3) to justify revocation of the organization's tax exemption would render the statute unconstitutional. See 28 A.F.T.R.2d (P-H) ¶ 71-5260, at 71-5945 (N.D. Okla. 1971). This Court held that the district court's decision was not directly appealable under Section 1252, and instead that appeal properly lay to the court of appeals. The Court explained (404 U.S. at 565-566): "Although the [statutory] construction was based on a constitutional premise, it did not amount to a holding that an Act of Congress is unconstitutional, as contemplated by § 1252. To the contrary, the District Court construed the section so as to save its constitutionality." Similarly here, the district court's holding rested on a construction of the statute that it viewed as avoiding constitutional difficulties, and the court of appeals correctly held that the decision was not directly appealable to this Court under 28 U.S.C. 1252.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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